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FILED
MAY 8 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 518 and 536

THE ATLANTIC REFINING COMPANY, *et al.*,
Petitioners,
v.
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,
Respondents.

TENNESSEE GAS TRANSMISSION COMPANY,
Petitioner,
v.
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL BRIEF
OF
RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.

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Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A. 346

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SUPPLEMENTAL BRIEF

OF

RESPONDENT PUBLIC SERVICE COMMISSION OF NEW YORK IN REPLY TO *AMICUS CURIAE* BRIEF OF THE FEDERAL POWER COMMISSION.

On April 10, 1959, the Federal Power Commission filed an *amicus curiae* brief herein, specifically stating that "it does not urge that the decision below be reversed" (*id.* pp. 11, 105). Instead, the Commission urges disapproval by the Court of (1) the grounds stated by the Court below as the

basis for its decision; (2) the additional grounds urged by the New York Commission in support of its affirmance and, apparently, (3) any others which might sustain it.

The Commission's neglect to petition for certiorari in this action and its failure to file its *amicus* brief simultaneously with the briefs filed by petitioners, deprived the New York Commission of an earlier opportunity to answer the arguments therein contained. Inasmuch as the Commission's brief is hostile to our position, factually inaccurate in numerous specific respects and, absent full explanation, misleading in some of its implications, the New York Commission feels impelled to submit the instant reply.

SUMMARY OF ARGUMENT.

I.

The principal thesis of the Commission's argument, identical with that developed in its post-CATCO decisions*, is that the Commission may, should and probably is legally required to subordinate (i.e., eliminate) consideration of the issue of price in its appraisal of the requirements of public convenience and necessity in respect of producer sales (*Amicus* Br. p. 32 *et seq.*). We have commented at length in our initial brief** upon the factors which establish that the Commission is incorrect in this basic thesis. We propose to show herein that the factors upon which the Commission now relies to support its thesis simply do not support its position.

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* See N. Y. Comm. Br., pp. 36-42.

** N. Y. Comm. Br., pp. 46-52.

II.

The Commission's second argument would appear to be directly antipathetical to its primary thesis. It is that "in a number" (p. 41) or "approximately fifty" (ftn. 39, p. 93) producer-certificate proceedings, the Commission has actually emphasized rather than subordinated price considerations by attaching price conditions to its issuances of producer certificates. Thus, the Commission would suggest that, to an appreciable extent, its actual practice has been precisely the opposite of the policy it espouses in its brief and here asks the Court to accept as a sound regulatory approach to the initial-price problem.

Matters would be sufficiently confused if the Commission's brief disclosed all of the underlying facts. As we will show herein, it does not. Those facts, in summary, are that *within the last few months* and only in the direct shadow of review by this Court of its present producer initial-price policy, the Commission has given broad hints (but taken no definitive action to implement these hints) that it may, in the future, revive the use of its initial-price conditioning authority which last saw service in the *Signal* case.* It has not disclosed at what price or under what circumstances the price conditioning authority might again be called into play, if at all. It has not conceded the impropriety of, nor taken steps voluntarily to correct recent unconditional certifications at prices up to 23.3¢ per Mcf. It has not expressly relinquished its devotion to the "no interference with a contractually agreed initial price" principle. In fact, its *amicus* brief is primarily directed to advocacy of that principle.

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* *Matter of Cities Service Gas Co., et al.*, Docket Nos. G-2569, et al., Opinion No. 288, 14 F. P. C., 12 PUR 3d 3, affd. *sub. nom. Signal Oil & Gas Co.* v. *F. P. C.*, 3 Cir. 1956, 238 F. 2d 771, cert. den. 353 U. S. 923 (1957).

It is impossible at this date to evaluate the significance of the Commission's "new look." If it should emerge as a genuine price conditioning policy, it can only serve to emphasize the extreme impropriety of the CATCO decision. If it proves abortive, it can only emphasize the urgent necessity for judicial scrutiny of the Commission's existing initial-price practices.

III.

The Commission's third major point is summarized under its heading "Gas Consumers Have Received Adequate Protection in Producer Certificate Proceedings" (*Amicus* Br., p. 101).

The Commission presumably means to suggest, by the quoted language, that gas consumers have not been injured monetarily despite its failure to afford price protection in producer-certificate proceedings. That suggestion, however, would be as inaccurate as the one conveyed by the Commission's own words. As we hereinafter show, the Commission has used inappropriate statistical data which tends to obscure or minimize the obvious and inescapable adverse effect of its initial-price policy on natural gas consumers.

IV.

Finally, the Commission urges that CATCO is "atypical" and that this Court should, therefore, consider the case only for the limited purpose of disapproving the reasoning (but not reversing the decision) of the Court below.

There is nothing essentially "atypical" about this case. Unconditional certificates were here granted upon evidence of "arm's-length negotiation" of the contractual sales

price and upon threats (overt) to withdraw the gas if the producers' price demands were not unconditionally satisfied. Unconditional certificates have uniformly been granted in other producer-certificate proceedings upon similar evidence of "arm's-length negotiation" and similar threats (implied) of gas withdrawal. As petitioners in *Public Service Commission* v. *Federal Power Commission*,* we know of no essential difference between that record and the instant one. The Commission, the respondent in that case, has pointed out no essential difference. Resolution of the pressing initial-price question has already been too long delayed, to the serious and probably irreparable injury of the gas consuming public. Further delay would accomplish nothing but to preserve the exploitative opportunity and advantage presently enjoyed by natural gas producers.

ARGUMENT.

I.

Price is the vital element in a producer-certificate proceeding, as the Commission itself formerly recognized. There is nothing to support its present contrary view.

At pages 50-51 of its brief, the Commission purports to state the guiding principle of its present producer initial-price policy:

> "It is therefore clear, we submit, that on the face of the Gas Act the exclusive procedure for applying the 'just and reasonable' rate standards of Sections 4(a) and 4(b) to rate changes is provided by Sections 4(d) and 4(e), and to existing rates by Section 5(a)."

* C. A. 3, No. 12805.

We do not now dispute nor have we ever disputed the validity of this general proposition.* Neither do we now minimize, nor have we ever minimized, the difficulties in determining just and reasonable rates (*Amicus* Br., pp. 84-91). On the contrary, *because* of our reliance on rate proceedings for the ultimate determination of just and reasonable rates, and *because* of our appreciation of the difficulties and delays inherent in reaching such determinations, we have never insisted upon findings as to justness and reasonableness in certificate proceedings and we have consistently limited our requests for initial-price conditions to levels which are merely non-disruptive,** although these (as for example, the May 20, 1957, 18-cent price condition in CATCO) are uniformly higher than any price yet found to be just and reasonable in a completed rate proceeding or any price yet computed by the Commission's staff in a pending rate proceeding as equivalent to any producer's unit cost of service (including healthy allowances for return).

We do, however, dispute the validity of the inference drawn by the Commission from the quoted proposition—and others of similar ambiguity and generality—that the Commission should not, and probably has no power in a producer-certificate proceeding to scrutinize or to effect any alteration in contractually agreed initial prices. This infer-

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* The Commission appears somewhat confused as to which side is responsible for interjecting the opposite view into the action. At p. 32 it seems to attribute that role to Petitioners and at pp. 43, 47 and 72, to Respondents. Although we cannot speak for any other party, we wish to make it perfectly clear, if we have not already done so, that we have *never* claimed the Commission is required to determine "just and reasonable" rates in certificate proceedings. See N. Y. Comm. Br., pp. 49-50.

** i.e., "hold-the-line" prices—designed merely to safeguard the consuming public against unjustified price increases in the interim period until such time as just and reasonable producer rates may be determined.

ence, we believe, is not warranted by the quoted language or by the other factors on which the Commission relies.

Moreover, we believe that the Commission's policy of non-interference with contractually agreed initial prices has been responsible not only for the enormous and totally unjustified upsurgence in wholesale and consumer prices for natural gas, but that it has complicated the difficulties in and prolonged the resolution of those very rate proceedings under Sections 4 and 5, the completion of which the Commission would ask the consuming public to await.

a. The ordinary duty of a regulatory agency to "balance all elements"* in determining public convenience and necessity does not eliminate price as the "vital element" in a producer-certificate proceeding under the Natural Gas Act.

As we have previously observed**, the other "elements" which must ordinarily be balanced in certificate proceedings under other statutes, or in pipeline-certificate proceedings under the Natural Gas Act, are simply non-existent in producer certificate proceedings. Price is virtually the *only* element which gives purpose to a producer-certificate proceeding and meaning to the statutory producer certification requirement.

Even the Commission, which speaks in expansively plural terms of balancing "all elements," can concretely offer only one element to balance against that of price—i.e., the element of a public need for additional gas service.

We do not deny that a public need for gas service may properly be found to outweigh (1) injury to a competing fuel interest; (2) injury to another gas company serving in the area; (3) injury to industrial gas users; or even (4)

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* *Amicus* Br., pp. 39-44.

** N. Y. Comm. Br., p. 47.

objections of State Conservation Commissions (*Amicus* Br., pp. 42-43).

We do not deny that a finding of a public need for gas service must be made (in the *pipeline*-certificate proceeding) in order to support a determination that a proposed pipeline construction program should be authorized at all.

We do, however, emphatically deny that proof of that element, in the *pipeline* proceeding, should uniformly and automatically carry with it authorization for the related sale *at any price demanded.*

The primary function of the Commission, unlike that of a Chamber of Commerce, is not the promotion and satisfaction of an expansion of public needs or desires for the regulated commodity. It is to safeguard consumers against price exploitation. While the Commission may certainly balance the element of need against the element of price, and adjust the two by attaching initial-price conditions to its authorizations of sales (or otherwise), it may not, as a general rule of policy, totally sacrifice its most important duty solely in the interests of satisfying public need for additional gas service.

Ordinarily, no such sacrifice—no such either/or choice—is even necessary or called for. While the Commission believes it should voluntarily abjure its prime regulatory function—without even testing the effects of its exercise upon the continuance of ample additional supplies of gas—simply defies understanding.

b. The relative insignificance of price considerations in certificate proceedings under other statutes has no bearing on their vital importance in producer-certificate proceedings under the Natural Gas Act.

With complete disregard of the economic differences between the natural gas producing industry and other

regulated industries, the Commission cites the relative insignificance of price as an issue in certificate proceedings under other regulatory statutes as supporting authority for its subordination (elimination) of that issue in producer-certificate proceedings under the Natural Gas Act.*

We do not think it necessary to belabor the point that the legislative purpose reflected in the enactment of the regulatory statutes cited by the Commission (elimination or prevention of cut-throat price competition which had or would, if not curtailed, debilitate the industry) can scarcely be thought to be applicable to the natural gas producing industry.

We do, however, believe it is significant that we have been unable to discover any certificate proceeding under any of the cited statutes in which an applicant sought, much less obtained, authority for institution of a new service at a rate not only higher than its own existing rates for the same service, but 78%** higher than the average of all existing rates for the same service.*** We would suggest that therein lies the explanation for the relative unimportance of price issues in other certificate proceedings.

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* *Amicus* Br., pp. 69-77.

** Ratio of the Catco price, ex-tax, to the average wellhead gas price for the year 1957. See *Amicus* Br., p. 103.

*** In fact, in most of the cases cited on pages 72 to 76 of the *Amicus* brief, intervenors complained that the applicants' proposed initial rates were too low, rather than too high.

c. Nothing in the legislative history of the Natural Gas Act or in this Court's *Mobile or *Memphis*** decisions conflicts with the explicit language of Section 7(e) of the Natural Gas Act or inferentially repeals the Commission's statutorily conferred conditioning authority.**

Notwithstanding judicial affirmance, nine months after the *Mobile* decision, of the Commission's sole exercise of its conditioning authority (the *Signal* case), the Commission has recently been obsessed with an apparent conviction that *Mobile* has, in some manner, effected a judicial repeal of the conditioning authority explicitly conferred on it by statute. It seems to believe, in the light of that decision, not only that it *should not* interfere with contractually agreed initial prices, but also that *it has no power to do so* (*Amicus* Br., pp. 44-47). Nothing in *Mobile* supports this view.

The Commission purports to find further confirmation in the legislative history of the Natural Gas Act that its conditioning authority may not mean what the statute seems to say. The colloquy quoted in support of this belief (*Amicus* Br., pp. 53-55) appears to deal exclusively with the well-known procedure of filing existing contracts as rate schedules immediately upon the enactment of a new regulatory statute. It does not refer or appear to have anything whatever to do with the certificate section of the statute or the expressed conditioning authority contained therein.

The Commission's construction of obviously inapposite language to justify its expressed belief in its own lack of power to impose initial price conditions, suggests that the wish has been father to the thought.

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* *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332.

** *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U. S. 103.

d. The Commission's subordination (elimination) of the price issue in certificate proceedings has complicated and delayed its determination of just and reasonable rates in Sections 4 and 5 proceedings.

Although the Commission cites the rate sections of the statute as its principal justification for elimination and deferral of price scrutiny in certificate proceedings, it has resolutely ignored the fact that this policy has been responsible for impeding resolution of the very rate proceedings upon which it would rely for ultimate adjustment of all price inequities.

An illustrative instance is found in *Trancontinental Gas Pipe Line Corporation, et al.** The Commission, in accordance with its present policy, "subordinated" the price issue in its determination of public convenience and necessity and unconditionally issued producer certificates at price levels which it then knew would trigger favorite nations clauses in 35 of the buyer's existing gas purchase contracts. Twenty-two of the suppliers under the "triggered" contracts promptly submitted rate filings calling for the indicated increases. They have thereby added, at one fell swoop, 22 to the total number of rate proceedings which must be prepared, heard, argued, briefed and decided before just and reasonable rates can ultimately be determined for these suppliers. In this way the Commission's policy of non-interference with initial rates has helped to deprive natural gas consumers of protection against price exploitation not only at the certification stage but at all stages of the regulatory process.

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* Docket No. G-13143, *et al.* Opinion 315, 20 F. P. C. 264, apps. pdg., *Public Service Commission of New York* v. *F. P. C.*, C. A. 3, No. 12805, and *United Gas Improvement Co. & Philadelphia Electric Co.* v. *F. P. C.*, C. A. 3, No. 12797.

II.

Except for its *Signal* decision, the Commission has *never* taken effective action to safeguard natural gas consumers against excessive initial rates.

At pages 41 and 92 of its brief, the Commission alleges that it has imposed initial price conditions in numerous producer-certificate proceedings. Unamplified, these statements might suggest that, apart from the "atypical" CATCO fiasco, the Commission has ordinarily been diligent in curbing initial pricing excesses by natural gas producers. No inference could be more erroneous.

Between November 28, 1955, the date of its *Signal* decision, and November 18, 1958, the Commission did not once, to our knowledge, (except for its earlier superseded CATCO orders) attempt to impose a producer initial price condition or otherwise to check the rapid upsurgence in producer initial prices.* On the latter date, *ten days after the granting of certiorari, on the Commission's acquiescence, in Oklahoma Natural* ** *and four days after the filing of petitions for certiorari herein by the CATCO group,* the Commission for the first time gave a tentative and

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* An earlier proceeding, cited by the Commission as an instance of initial price conditioning, is actually a peculiar and non-recurring situation. In *Sunray Mid-Continent Oil Company*, Docket No. G-16134, app. pdg. *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, C. A. 10, No. 6061 (Amicus Br. ftn. 39, p. 93), Sunray, a late-signing, minority-owning signatory to a sale contract which had previously been certificated at 16¢, belatedly applied for certificate authority in its own name at the then escalated contract rate of 16.4¢. The Commission granted temporary authority at 16¢ with the proviso that Sunray's permanent certificated price await disposition of the pending rate proceeding on the lawfulness of its co-signers' 16.4¢ rate.

** *Oklahoma Natural Gas Co.*, v. *F. P. C.*, No. 288, October Term 1958. For the antecedent and subsequent history of that case, see N. Y. Comm. Br., p. 35, ftn. *.

wholly inconclusive hint of a possible change in policy. In issuing a *temporary* certificate of public convenience and necessity for a sale by Shell Oil Company at Docket G-13878*, it included a condition requiring the applicant to agree to accept retroactively the rate to be determined at the subsequent *permanent* certificate proceeding. Thereafter, and with increasing frequency during the last two months, similar conditions have been attached to other producer temporaries.

Since none of the temporary certificates so conditioned have yet culminated in the issuance of permanent certificates, it is plainly impossible, at this date, to evaluate fully this eleventh-hour change in the Commission's initial-price policy. There is, of course, no assurance that the permanent certificates, when issued, will carry with them the initial price conditions hinted at in the temporaries.**

The Commission's ostensible revival of an interest in initial-price conditioning at the courthouse door, via the inconclusive, tentative and readily reversible conditions imposed in respect of temporary certificates, indicates no change of attitude by the Commission in respect to its initial-price policy. This view seems to be confirmed by the intermediate decision on the first temporary certificate so conditioned. The Presiding Examiner there concluded (albeit reluctantly) that, notwithstanding the condition included in the temporary certificate, Commission pre-

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* We believe the docket reference at ftn. 39, p. 39 of the Commission's brief is incorrect in the last digit.

** The prospects therefor do not appear to us very promising. As late as September 4, 1958, the Commission had issued unconditional certificates to producers at prices up to 23.3¢ per Mcf. These prices were then known to cause triggering of the buyer's existing gas purchase contracts in an amount of $5,000,000 annually. The Commission's opinion of that date (ftn. p. 11, *supra*) contains no suggestion of retreat from or modification of its principle of non-interference with contractually agreed initial prices.

cedents prohibited his imposition of price conditions in Shell's permanent authority*.

One further aspect of the Commission's ostensible "new look" deserves the attention of this Court. With a single exception, all of the producers issued temporary certificates conditioned as indicated herein have accepted them, notwithstanding that their "economic hazards" in proceeding with the sales without certain knowledge of the price they will ultimately receive and their opportunities to "withdraw their gas from jurisdictional sales and dispose of it elsewhere than to interstate pipelines and the consuming public", were as great (or as non-existent) as CATCO's.

III.

Gas consumers have been and will continue to be seriously injured by the Commission's failure to afford adequate protection in producer certificate proceedings.

At pages 102-3 of its brief, the Commission states:

> "The average cost of gas purchased by all pipelines from independent producers between 1954 . . . and 1957 . . . inclusive, increased from 9.9¢ per Mcf to 12¢ per Mcf, during a period when the wholesale price index increased from 110.3 to 117. During the same period, the average price paid by residential consumers for natural gas increased only from 89.3¢ per Mcf to 93¢ per Mcf, while the consumer price index increased from 114.8 to 121.6."

The Court is evidently invited to infer that although the wellhead price of this regulated commodity increased far more rapidly than the wholesale price index for all com-

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* Intermediate decision of the Presiding Examiner in *In the Matters of El Paso Natural Gas Co., et al.*, Docket Nos. G-12580, *et al.*, issued February 26, 1959.

modities (21.2%*, as compared with 6.1%), the consuming public has not been correspondingly injured because the retail price of gas advanced less rapidly than the retail price of all commodities (presumably 4.1%, as compared with 5.9%).

These figures are suspect on their face. Reason insists that higher prices received by producers must ultimately be reflected in concomitantly higher prices paid by consumers, and that the passing on of price increases can be only temporarily impeded by a 5-month suspension at the pipeline level. Further analysis reveals that the figures are indeed more than suspect.

At the very outset, the Commission has used improper figures for purposes of its own comparison. The Bureau of Labor Statistics source cited at ftn. 49, p. 103 of the Commission's brief, indicates that the consumer price index for the year 1957 should correctly be stated at 120.2, not at 121.6 as shown in the Commission's brief (p. 103)**. By substituting the former figure for the latter, increases in retail natural gas prices would be shown to compare rather evenly with increases in retail prices for all commodities (4.1% as against 4.7%, rather than as against 5.9%).

Even this adjustment, however, fails to take account of another basic deficiency in the Commission's price comparisons. The Court will observe that the Commission has used Bureau of Labor Statistics data as sources for wholesale and consumer price indices and for wellhead natural gas prices (ftns. 47 and 49 at p. 103 of its brief). Significantly, it used another source (ftn. 48) for retail natural gas prices, despite the fact that the Bureau of

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* Comparison of nation-wide increases in wellhead prices with those for Louisiana only for the same period (N. Y. Comm. Br., p. 43), shows a much steeper rate of climb in the most prolific gas-producing area than in the nation as a whole.

** The Commission evidently selected the figure for the single month of December 1957 rather than for the full year, although it otherwise uses full-year average figures.

Labor Statistics compiles data for that item, that such data is readily available and, most important, that the Bureau of Labor Statistics compiles retail natural gas price data in the same manner as it compiles its other indices. Therefore, its indices are more appropriately comparable with each other than with data furnished by other sources using other methods of statistical compilation.

A possible explanation for the Commission's selection of a different source for retail gas prices does not lie far off. Data derived from Bureau of Labor Statistics reports show an increase in retail natural gas prices from 1954 to 1957 (divided into two component parts of 10-therm and 25-therm gas) not of 4.1%, but of 7.1% and 9.6%, respectively*. Thus,

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*COMPARISON OF INDEX OF RETAIL PRICES OF NATURAL GAS WITH CONSUMER PRICE INDEX

1954-1958

(1947-1949 = 100)

Year	Natural Gas		Consumer Price Index
	10 Therms	25 Therms	
1954	100.0	112.8	114.8
1955	101.8	117.3	114.5
1956	103.8	120.0	116.2
1957	107.1	123.6	120.2
1958	111.9	131.6	123.5
Per Cent Increase			
1954–1957	7.1%	9.6%	4.7%
1954–1958	11.9	16.7	7.6
1957–1958	4.5	6.5	2.7

Source: Index of Retail Prices of Natural Gas:
U. S. Department of Labor, Bureau of Labor Statistics, Retail Price Indexes of Fuels and Electricity:
1954: January 1955—August 1955 issue
1955: December 1955 issue
1956: December 1956 issue
1957: January 1958 issue
1958: December 1958 issue

Consumer Price Index:
1954–1957: Economic Report of the President, January 1959, p. 185
1958: U. S. Department of Labor, Bureau of Labor Statistics, *Consumer Price Index*, "Price for Selected Items & Groups, December 1957-December 1958."

appropriately comparable statistics would show that even in pre-CATCO days consumer prices for natural gas had increased more rapidly than retail prices for all commodities including those which were unregulated.

It is further significant that the Commission has chosen to terminate its comparison of wellhead and consumer natural gas prices at the year 1957, although Bureau of Labor Statistics data are available for the full year 1958 and the first month of 1959. The 1957 natural gas prices, of course, reflect only to a very minor extent wellhead prices as high as 21¢ per Mcf. They reflect not at all the CATCO price of 22.4¢ per Mcf*, nor the enormous volumes certificated at even higher prices after CATCO.

Data for 1958, as might be anticipated, show not only a continuation of the upward trend in natural gas prices, but also an acceleration in the rate of increase at both the wellhead and consumer levels. For example, although wellhead prices had increased an average of approximately 7% per annum for the 3-year period 1954-1957 (from 9.9¢ per Mcf to 12.0¢ per Mcf), they advanced 7.5% from 1957 to 1958 (from 12.0¢ to 12.9¢ per Mcf**). Similarly retail natural gas prices, which advanced an average of 2.4% per annum for 10-therm gas and 3.2% per annum for 25-therm gas for the period 1954-57, increased 4.5% and 6.5%, respectively, from 1957 to 1958***.

The Commission's attribution of increases of this rapidity and this magnitude to "rising material and service costs borne by producers and pipelines" (p. 103), would be gratuitous speculation at best. In the case of pipelines it is

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* CATCO gas began to flow in June, 1958.

** U. S. Department of Labor, Bureau of Labor Statistics, *Wholesale Price Index*, March 1958 to January 1959.

*** See ftn. *, p. 16, *supra*.

demonstrably untrue.* Their increased costs, for the most part, are in one area only—costs of purchased gas.** In the case of producers the relationship, if any, between rising costs and rising prices is the very subject of inquiry in pending rate proceedings and cannot be assumed by the Commission for the purposes of this action.

IV.

1. There is nothing essentially "atypical" about the CATCO proceeding and no reason for the Court to limit the ordinary scope of its review.

2. The decision below is not only correct on the particular facts of this case, but is of much broader applicability than the Commission is willing to recognize.

The Commission is seriously in error as to the precise content of the record which it has herein characterized as "atypical". It is in error in at least three specific instances.

First, the 21.4¢ price (ex-tax) demanded by CATCO was *not* "equal to or lower than a number of other current prices for gas produced in the same area from wells on dry land" (*Amicus* Br., p. 7, ftn. 5) as the record cita-

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* See Connole, *Threshold Prices: A Practical Proposal for Producer Pricing*, 63 Public Utilities Fortnightly 23, 26, Jan. 1, 1959.

** For example, according to Tennessee's Annual Report for 1954, its average cost of purchased gas was 10.30¢ per Mcf. In 1957, that average cost had advanced to 12.54¢ per Mcf (R. 44a). According to its most recent rate filing in Docket G-17166, its average cost of purchased gas for the test year ended July 31, 1958 was 16.02¢ per Mcf.

tion immediately following the Commission's statement clearly shows*.

Second, the Commission had *not* found that "the CATCO gas [if not certificated at the demanded price] would in all probability be employed as boiler fuel by industrial purchasers—a low grade and socially wasteful use of this fuel" (*Amicus* Br., p. 8). The record reference cited for such a finding discloses none. No such finding was made or could have been made, for the very obvious reason that the record contained no evidence to support it**. Moreover, as the Commission well knows, it may and has prevented the "socially wasteful" disposition of natural gas as boiler fuel by the very simple device of declining to issue pipeline authority to transport gas for this purpose***.

Finally, "the need for . . . the proposed sale" was *not* conceded by all parties to the proceeding (*Amicus* Br., p. 3). It certainly was not conceded by this party. Since the Commission had denied our motion to consolidate the CATCO proceeding with the related Tennessee certificate proceeding† and since the latter proceeding was not then under way (and was not concluded until January of the present year) we were in no position to concede Tennessee's need for CATCO gas under any circumstances. We certainly did not concede Tennessee's need for the CATCO gas at 22.4¢

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* And, in the face of CATCO's adamant refusal to explain their costs, the Commission can hardly assume the offshore location of the wells as a satisfactory explanation for the higher than onshore prices. Moreover, the CATCO prices (and higher) immediately washed up on shore (N. Y. Comm. Br., p. 36).

** See N. Y. Comm. Br., pp. 54-55.

*** *Re Mississippi River Fuel Corp.*, Opinion No. 250, 12 F. P. C. 109, 98 PUR (NS) 129 (1953).

† R. 332a-334a, 361a-366a.

per Mcf, that issue being the very heart of the entire controversy.

The record before the Commission in the CATCO proceeding and the Commission's order of June 24, 1957 show very plainly that unconditional certificates were issued to the CATCO applicants upon the bases of (1) arm's-length negotiation of the contractual initial price; (2) the finding (here unsupported) of a need for additional gas by consumers served through the purchasing pipeline; and (3) the threat (here overt) of contract termination and gas withdrawal unless certificates satisfactory to the applicants were forthcoming. Similar unconditional certificates of public convenience and necessity at similarly unjustified initial prices have been issued to producer-applicants upon precisely the same bases in literally dozens of proceedings*.

The *Amicus* brief devotes 12 pages (39-51) to the proposition that, when the element of public need for gas service is balanced against and found to outweigh the element of price, the Commission is justified in unconditionally certificating a proposed sale without further inquiry into the propriety of the price demanded. This proposition rests upon the basic assumption that the satisfaction of public needs for gas service is inherently incompatible with the obtaining of justifiable initial prices for gas; that the one element must necessarily be sacrificed to the other.

Yet the statute itself provides the perfect vehicle for accommodating both desiderata—by *granting* certificates of public convenience and necessity *and* imposing price conditions demanded in the public interest. The only basis for the Commission's "either/or" assumption is its apprehension that insistence on justification for prices chosen by

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* N. Y. Comm. Br., pp. 22-43.

applicants will inevitably be met by threats to withdraw supply. This apprehension is allegedly based upon a long list of factors (*Amicus* Br., pp. 95-101), none of which are supported by evidence in this or any other record. It is emphatically belied by the producers' general acceptance of the price-conditioned, temporary certificates issued by the Commission in recent days.

Thus, although the Commission's capitulation to unsupported threats of gas withdrawal is revealed with unusual dramatic intensity in CATCO, such capitulation is not in the least "atypical". It pervades all of the Commission's unjustified high price producer certifications issued to date. It pervades the whole of the Commission's philosophy on the subject of initial producer pricing.

The Court below has held that an applicant's intransigence, its (here expressly avowed) unwillingness to make an adjustment or accept the conditions required by public convenience and necessity, could not lawfully enter into, change, affect or influence the Commission's determination of whether the proposal, *as finally tendered,* was in the public interest or had been so proven. *A fortiori,* the Commission's *apprehension* of intransigence or unwillingness to accept conditions, can be given no greater weight in its consideration of the requirements of public convenience and necessity.

The Commission's assumption that the decision "rest[s] mainly on its particular facts*" and has "ceased to have general significance"**, though convenient (in that it spares the Commission the duty of applying the Court's reasoning where the particular facts—overt threats—are absent) is unfounded. The decision has already raised

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* *Amicus* Br., p. 17.

** *Amicus* Br., p. 18.

"questions of general importance". The very fact that the Commission is unwilling to acknowledge the broad scope of the decision below—that it has announced its intention to confine the holding to the precise, narrow and never-to-be-repeated facts appearing in this record—is, we respectfully submit, the most persuasive indication that full and unrestricted review (and ultimate affirmance) by this Court of the decision below is urgently required*.

Dated: May 6, 1959.

Respectfully submitted,

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* *Cf.* N. Y. Comm. Br., pp. 60-62.